No 80-496

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES C. BURNS; C. H. CARTER; LOUIS J. GIDDENS; DELBERT R. GRANDE; DAVID C. MILLIGAN; THOMAS M. POTTER; JAMES A. RIDDLE; W. R. TODD; JOSEPH O. TURNER, II; KENNETH E. MAGENHEIMER; JACK CLINE; and ROLAND L. LANCASTER,

Petitioners,

versus

GULF OIL CORPORATION,
a foreign corporation,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals erred in concluding no merit to the Petitioners' claim for benefits or damages pursuant to their contractual relationship with the Respondent on account of the Respondent's wrongful discharge of the Petitioners.

The Court of Appeals erred in affirming final summary judgment entered by the District Court on Petitioners' claim for per se slander and intentional or reckless infliction of emotional distress upon the Petitioners by Respondent.

The Court of Appeals erred in its conclusion that the District Court's granting of a motion in limine without the giving of any prior notice of the motion or hearing and therefore, caught the Petitioners by surprise and materially prejudiced their right to fair trial with effective assistance of counsel.

That there is no substantive difference between a public or private employer's discharge of an at-will or non-tenured employee for slanderous reasons, or in violation of his constitutionally and/or statutorily protected rights. Both such employers are, and should be, responsible therefore.

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OPINIONS BELOW

The decision sought to be reviewed is entitled JAMES C. BURNS, et al v. GULF OIL CORPORATION, a foreign corporation, bearing appellate case no. 78-3263, appealed from the United States District Court from the Middle District of Florida. The decision is dated June 4, 1980 and made a part of the appendix at pages 1a through 3a submitted herewith, rehearing having been denied July 2, 1980, a copy of same is likewise made a part of the supporting appendix, page 4a.

JURISDICTION

The Petitioners contend that the Court of Appeals for the Fifth Circuit by affirming the summary judgment herein conflicts with decisions of other federal courts on the same or similar matter and has decided a federal question in a way in conflict with a state court of last resort and has otherwise so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The instant decision facially conflicts with applicable decisions of this Court construing the equal-protection rights of United States citizens.

INVOLVED CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

Florida Statute 447.03

"Employees shall have the right to self-organization, to form, join, or assist labor unions or labor

organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Florida Statute 447.17

"(1) Any person who may be denied employment or discriminated against in his employment on account of membership or nonmembership in any labor union or labor organization shall be entitled to recover from the discriminating employer, other person, firm, corporation, labor union, labor organization, or association, acting separately or in concert, in the courts of this state, such damages as he may have sustained and the costs of suit, including reasonable attorney's fees. If such employer, other person, firm, corporation, labor union, labor organization, or association acted willfully and with malice or reckless indifference to the rights of others, punitive damages may be assessed against such employer, other person, firm, corporation, labor union, labor organization or association.

(2) Any person sustaining injury as a result of any violation or threatened violation of the provisions of this section shall be entitled to injunctive relief against any and all violators or persons threatening violation.

(3) The remedy and relief provided for by this section shall not be available to public employees as defined in part II of this chapter."

Art. I, §6, *Florida Constitution*, (1968)

"The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not have the right to strike."

Amendment V, *United States Constitution*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, §1, *United States Constitution*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rules of Civil Procedure, Rule 6(d)

"(d) For Motions-Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time."

Federal Rules of Civil Procedure, Rule 7(b)

"(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with

particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

42 USCS §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 USCS §1985

"(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be perform-

ed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Florida Evidence, Rules 82 and 83

"Rule 82. Relevancy — Definition

Evidence is relevant if it has any tendency in reason to prove any material fact in issue."

"Rule 83. Relevancy Distinguished From Admissibility and Materiality

To be admissible, evidence must be both relevant and material; but even though relevant and material, evidence may not be admissible if it is barred by some rule of expediency, public policy, or procedure."

Federal Rules of Evidence, Rules 401 and 402

"Rule 401. Definition of 'Relevant Evidence'

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

"Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

STATEMENT OF THE CASE

This was a diversity of citizenship case under Title 28 of the United States Code, §1332.

The twelve Petitioners, all residents of Florida, filed their Complaint on September 24, 1975 alleging in Count I that they have been wrongfully discharged by the Respondent herein and that they had been deprived of their property interest in their job without due process of law. In Count II, the Petitioners herein alleged that they had been slandered by (employees of) the Respondent. Respondent, at the time the Complaint was filed in the District Court, was a foreign corporation doing business in the State of Florida and the amount in controversy exceeded $10,000.00.

On December 31, 1975, the District Court granted the Respondent's Motion to Dismiss for failure to sufficiently allege jurisdiction without prejudice to the filing of an Amended Complaint within twenty days. Thereafter, on January 14, 1976, the Petitioners herein filed an Amended Complaint. That Count I of the Amended Complaint alleged that the Respondent had intentionally breached employment agreement and that said breach of employment agreement was for false, arbitrary and discriminatory or mercenary reasons. In Count II of that Complaint, the Petitioners alleged that they had been slandered by employees of Gulf Oil Corporation and that the conduct and actions of the Respondent herein constituted the tort of out-

rage of the intentional or reckless infliction of mental and emotional distress. Count III of the Complaint alleged a conspiracy to deprive the Petitioners of equal protection, and the privileges of immunities of law, Title 42, §1983 and §1985 of the United States Code.

Thereupon, Respondent filed a Motion to Dismiss the Amended Complaint. Thereafter, on April 4, 1976, the District Court entered an Order on a Motion to Dismiss the Amended Complaint dismissing Count I of the Amended Complaint with leave to amend within twenty days. Said Order deferred the Respondent's response to Count II of the Amended Complaint until the filing of the Second Amended Complaint.

Thereafter, on April 15, 1976, the Petitioners herein filed their Second Amended Complaint wherein in Count I they again alleged the breach of the employment agreement and intentional breach of the employment agreement for false, arbitrary and discriminatory or mercenary reasons and realleged their allegations in Count II with respect to slander and the "tort of outrage."

On May 5, 1976, the Respondent herein filed its Motion to Dismiss Count I of the Second Amended Complaint. On June 16, 1976, the District Court entered an Order Denying the Respondent's Motion to Dismiss Count I of the Second Amended Complaint and directing the Respondent to respond within twenty

days. On July 8, 1976, the Respondent filed its Answer to the Second Amended Complaint. Thereafter, on February 25, 1977, the Respondent filed its Motion for Summary Judgment on Count I of the Complaint and on March 23, 1977, the Respondent filed its Motion for Summary Judgment as to Count II of the Second Amended Complaint. On March 31, 1977, the District Court entered an Order granting the Respondent's Motion for Summary Judgment as to Count I and denying Respondent's Motion for Summary Judgment or Partial Summary Judgment for Count II. Petitioners were directed to file within five days of the date of the Order a memorandum in support of their claim under the theory of the "tort of outrage."

Thereafter on December 6, 1977, the District Court entered an Order directing the Petitioners to file an Amended Complaint setting forth separate counts as to slander and the tort of outrage. In the same Order, the Respondent's Motion for Summary Judgment was denied.

On December 14, 1977 and pursuant to the directive of the District Court, the Petitioners filed their Third Amended Complaint wherein in Count I they alleged that the manner, method and motives of the Respondent in the discharge of the Petitioners herein constituted a deliberate or reckless infliction of emotional distress ("tort of outrage"). In Count II, the Petitioners alleged slander and the tort of outrage. There-

after, on December 30, 1977, the Respondent filed its Answer to Count II of the Complaint, Motion to Dismiss Count I of the Third Amended Complaint and Motion to Strike or in the alternative, Motion to Dismiss Portions of Count III of the Third Amended Complaint.

On January 18, 1978, the District Court entered an Order dismissing Count I of the Third Amended Complaint and directing the Petitioners to file an Amended Complaint within ten days on the two remaining causes of action, to-wit: slander and the "tort of outrage". Thereafter, on January 24, 1978, the Petitioners herein filed a Fourth Amended Complaint wherein they alleged in Count I the tort of outrage and in Count II, the action for slander. Thereafter, on February 8, 1978, the District Court entered an Order directing Petitioners to file another Amended Complaint within two days and directing the Respondent to respond within two days of the filing of the Amended Complaint. The Respondent's Motion for Summary Judgment regarding slander claim was denied for *the second time.* Petitioners, on February 9, 1978, filed their Fifth Amended Complaint wherein in Count I they alleged the "tort of outrage" and in Count II, they alleged the tort of slander. Respondent, on February 13, 1978, filed a Motion to Dismiss Count I of the Amended Complaint and on February 21, 1978, filed an Answer to Count II of the Fifth Amended Complaint. In response, the Petitioners on February 27, 1978, filed a

Motion for Entry of Default Judgment against the Respondent as to Count I of Petitioners' Fifth Amended Complaint for failure to comply with the Court's order to answer within two days as aforesaid. On June 7, 1978, the District Court entered an Order denying Respondent's Motion to Dismiss and the Petitioners' Motion for Default Judgment. Thereafter, on June 16, 1978, the Respondent herein filed its Answer to Count I of the Fifth Amended Complaint.

On the day of the trial, July 17, 1978, the Respondent herein filed a Motion in Limine wherein it sought to limit testimony and evidence to be presented at the trial by the Petitioners. That the Court granted said Motion in Limine on July 17, 1978.

Thereafter on August 25, 1978, the District Court entered Final Summary Judgment in favor of the Respondent and on August 29, 1978, granted Final Judgment that the Petitioners take nothing and that the cause be dismissed on the merits.

September 5, 1978, Petitioners filed their Motion for Rehearing and/or New Trial which was denied on September 29, 1978, and thereafter duly prosecuted their appeal to the Fifth Circuit Court of Appeals.

All of these Petitioners were employees of the Respondent, having worked for the Respondent a number of years ranging from six to over twenty years,

and all of them had good or higher work performance records with the Respondent up to the time of their discharge in June 1975.

That shortly prior to the Petitioners being individually informed of their discharge, Petitioners were individually called into one of Respondent's offices at the Port Tampa Terminal and there subjected to improper and unlawful interrogation during which representations on behalf of the Respondent, through its private investigators, were made to the Petitioners that the information furnished by the individual Petitioners would not even be placed in their file jackets. The investigators, on behalf of the Respondent, advised the Petitioners they were only interested in those individuals taking large quantities of gas for purposes of resale and not for taking small quantities for personal use, which was a long standing practice or custom engaged in by all employees including those at the management level.

That said private investigators, who were employees of the Respondent, never informed the Petitioners of their constitutional rights against self-incrimination, right of counsel, nor of the fact that they need not talk or discuss this matter at all, nor did the private investigators ever inform any of these Petitioners that they might or could lose their jobs as a consequence of having talked with said investigators.

That as a consequence of the foregoing, some of the Petitioners did give incriminating statements to said investigators and in said statements, identified others whom they had seen taking gasoline for their own personal use, some of whom are employees of the Respondent. Some of those Petitioners who were so identified, in fact, refused to give any statements to said investigators, but nevertheless and notwithstanding, were discharged for allegedly stealing company property.

As a result of the investigation, the Petitioners were discharged for cause while others who had committed like or similar acts, were retained.

When these Petitioners attempted to seek unemployment compensation from the Florida Unemployment Compensation Department, the Respondent appeared before said state agency and there reaffirmed and reasserted the false accusations for the purpose of depriving the Petitioners and their dependents of the compensation they would have otherwise been entitled to under Florida law.

That thereafter, at a meeting of truckdrivers still in the employ of the Respondent, management level representatives of the Respondent again repeated the false accusation of alleged theft as the cause of Petitioners' discharge.

Petitioners contend in the instant case that said asserted cause of discharge by the Respondent was false and that the real purpose sought to be accomplished by the Respondent was the discontinuation of the transporting of its own products and chose these Petitioners because they were active in attempting to organize the truckdrivers. That the Respondent employed oppressive and unlawful tactics in setting about to obtain the discharge of these Petitioners based upon the admissions unlawfully extracted as hereinabove mentioned, and in the process, violated Respondent's own expressed policy standards for the disciplining of its employees which said standards require equal and consistent treatment for all offending employees.

By virtue of the Petitioners' discharge as hereinabove mentioned, Petitioners were substantially denied their retirement benefits, pension and profit sharing plan benefits, severance pay, accrued vacation pay and the balance of their wages to the end of the next pay period which they would have otherwise been entitled to.

Petitioners additionally asserted that they were slandered by the false accusations and sustained as a result, extreme mental anguish and their ability to earn a livelihood was severely impaired and irreparable damages sustained to their reputations.

ARGUMENT

These Petitioners contend that they have been deprived of their Fifth and Fourteenth Amendment rights to the United States Constitution, Art. I, §6 rights contained in the 1968 Fla. Const. and equal-treatment rights guaranteed all citizens under the Civil Rights Act, Title 42, §§1983 and 1985, U.S.C., and their rights and remedies provided under §447.03 and §447.17, Fla. Stat. and those judicial decisions recognizing the existence of claims for per se slander and "tort of outrage" or reckless infliction of extreme mental anguish.

Capsulizing Petitioners' argument, the record will reflect that there was a long standing practice or custom for many years for employees including management-level employees, to take and use small quantities of company products when needed. That immediately prior to their discharge in June 1975, all of these Petitioners had good work performance records recorded by their superiors in their employee personnel files kept by the employer, but nevertheless, after individual interrogation by the special investigators who were also employees of Respondent, in which Petitioners were never informed of their constitutional and job rights, Petitioners were discharged for allegedly stealing company products. There was no evidence of such except the wrongfully obtained admissions of some, not all, and identification of those non-confess-

ing by those that made said identifications in their confessions.

Some of the current employees at the terminal were interrogated, made no admissions but were likewise identified as having taken and used company products in the same manner as Petitioners. The Petitioners contended that the Respondent violated its own expressed policy standards and rules for the disciplining of its own employees which mandated the treating of employees the same under the same circumstances and enjoined inconsistent treatment when deciding on appropriate disciplinary action and also provided a counselling or hearing mechanism. That these twelve Petitioners were active in attempting to organize the truckdrivers and the record reveals Respondent's interference with their state protected, statutory rights and remedies designed to protect them in their state right to organize. That when these Petitioners were terminated, some were denied their severance pay and other accrued benefits and all were denied their unemployment compensation afforded them under the state law on account of said false termination charges deliberately and wrongfully communicated by the Respondent to the state agency.

Approximately one and a half months after termination during the month of August 1975, at one of the Respondent's truckdrivers' meetings, the remaining drivers were told that the Petitioners were terminated for stealing company products.

As a consequence of the foregoing, Petitioners filed their complaint in the District Court based upon diversity of citizenship asserting among other things, wrongful discharge from employment arising out of a breach of the employment contract they held with the Respondent, per se slander, the tort of outrage or reckless infliction of mental anguish and initially, violation of Title 42, §§1983 and 1985, U.S.C., Civil Rights Act. This civil rights claim was earlier dismissed with prejudice on motion.

Petitioners were required to amend their complaint five times and after several motions to dismiss were finally denied including *motion for summary judgment* on the slander (twice) and tort of outrage counts, the case was set for jury trial.

The morning of the jury trial and in violation of the Federal Rules of Civil Procedure, Rules 6(d) and 7(b) — pertaining to service of motions, notices of hearing and requiring all pre-trial motions to be in writing, Respondent filed, and the District Judge granted, motion in limine severely limiting the scope of Petitioners' proof at trial.

Petitioners, in support of their "tort of outrage" claim, had alleged that one of the real reasons for the pretextual discharge was the fact that they were active in trying to organize the drivers at the terminal and that the Respondent violated Florida Statutes, §447.03

and §447.17 which prohibits attempting to coerce and intimidate employees in their decision to organize themselves and providing a civil damage remedy therefore. During the chamber hearing, when it became apparent that Petitioners were not going to be allowed to present all relevant evidence on their pending claims contrary to the Rules of Evidence, Florida and Federal, (*Williams v. State*, 110 So.2d 654 [Fla. App.]; Fla. Evid., Rules 82 & 83 and Rules 401 & 402 of the Fed. Rules of Evid.) — as a matter of fact *the* material evidence, but rather would be limited to the proof of discharge and the cause therefore and whether the asserted cause was true or not, without being allowed to develop the longstanding custom or practice permitting employee-use of company property, it was then apparent that Petitioners would not receive the fair trial and due process of law guaranteed to them under the Fifth and Fourteenth Amendments to the United States Constitution, particularly after the District Judge characterized Petitioners' case as a simple chicken-stealing case and inferring it wasn't worthy of a federal jury's time. Petitioners unsuccessfully sought recusal on account of said comments.

Final summary judgment was entered dismissing Petitioners' claims for per se slander and "outrage."

Petitioners prosecuted their appeal to the Court of Appeals, Fifth Circuit, contending that the District Court erred in dismissing their claims for wrongful dis-

charge on account of Respondent's breach of employment contract and their claim of conspiracy to violate their civil rights, that the court erred in entering final summary judgments on the per se slander and "outrage" claims and in granting Respondent's motion in limine.

The Court for the Fifth Circuit Court of Appeals affirmed the District Judge rendering a per curiam decision declaring there was no merit to the contract claim and suggesting that a claim should have been filed before the National Labor Relations Board if Petitioners wished to advance a labor-related claim, contrary to the decision contained in the case of *Mobley v. Southern Plasma Corp.*, 366 So.2d 480 (Fla. App. 1979). As to the slander and outrage claims, the Circuit Court found that Petitioners were not "surprised" by the motion in limine and that there was no prejudice to Petitioners in the granting of the in limine motion.

Petitioners suggest a violation of their state and federal constitutional, equal-protection rights as United States citizens in common with all who work for another in an effort to secure their inherent, constitutional right to earn a livelihood.

More specifically, Petitioners contend the instant decision also conflicts with that portion of this Court's decision in *McDonald v. Sante Fe Trail Transportation Company*, 427 U.S. 273, 49 L.Ed.2d 493, which recognized the lia-

bility of a *private employer* for unequal treatment in the discharging of some employees and the retention of others when all were charged with the same offense of mis-appropriating company property. In that case, the Court noted at page 2582 of its opinion that the terms of §1981 (Title 42, U.S.C., Civil Rights Act) applies to " 'all persons' including white persons - - -" and that the Act was intended to protect all persons in the United States in their civil rights when initially introduced in Congress.

The instant decision also conflicts with the following cases in that they each recognize the responsibility of (a public) employer for terminating an (non-tenured or at-will) employee for a false and slanderous reason without the hearing required by rule or statute. While these cases following involved a "public" employer that had undertaken to provide disciplinary-type hearings prior to discharge, Petitioners respectfully submit there is no substantive difference whether the status of the employer be "public or private" insofar as the protection of an employee's fundamental rights are concerned, whenever it appears the employer assumes to act with care by the promulgation of company rules providing a procedure for disciplining of employee.

In *Allison v. City of Live Oak,* 450 F.Supp. 200 (DCMD of Fla. 1978), it is noted:

> "Although reputation standing alone is not a constitutionally protected interest, when coupled with the loss of employment, it will invoke due process safeguards — a property interest is recognized when a 'legitimate claim of entitlement' is established."

To like effect, please see the Florida case *Drennen v. Westinghouse Electric Corporation*, 328 So.2d 52 (Fla. App. 1976).

The Petitioners contended before the Fifth Circuit Court of Appeals that the Respondent had voluntarily assumed a duty of care of obligation toward its employees which invested the at-will employment with a protectable property interest. In this regard, *Fidelity & Cas. Co. of N.Y. v. L.F.E. Corp.*, 382 So.2d 363 (2d DCA, Fla. 1980) is a Florida case that stands for the proposition that:

> "In every situation where a man undertakes to act, or to pursue a particular course, he is under an implied legal obligation or duty to act with reasonable care. - - -" (p 367)

To analogous effect are the decisions of *Allison v. City of Live Oak, supra,* and *Blevins v. Kreutzman*, 446 F.Supp. 1107 (DCED Wisc. 1978).

In *Owen v. City of Independence, MO.*, 100 S.Ct. 1398 (1980) the Court vindicated denial of procedural and substantive due process rights where it appeared that

the police officer alleged he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and as aptly noted by the Court at page 1415 of its opinion:

> "- - - A damage remedy against the offending party is a vital component of any scheme for vindicating, cherished constitutional guarantees, - - -"

and in the recent case of *Whirlpool Corp. v. Marshall*, 100 S.Ct. 883, the Court cogently observed at page 894,

> "- - - An employer 'discriminates' against an employee only when he treats that employee less favorably than he treats others similarly situated,"

and as we have seen in *McDonald, supra.*, private employers may likewise be held accountable in damages for denial or abridgment of basic constitutional rights.

Measuring the record in the instant case by these foregoing pronouncements, it would appear that these Petitioners have been "discriminated" against by the unequal treatment received at the hands of their employer in that others are retained who have committed the same act. That if indeed there was a long standing practice or custom of employee-use of com-

pany products, and the Petitioners acted in accordance with same, they would not have any felonious intent and could not have been guilty of stealing. *Mariner Charters, Inc. v. Foremost Insurance Company,* 316 So.2d 602 (Fla. App. 1975).

The District Judge initially denied summary judgment motion on Petitioners' claim for per se slander and had denied Respondent's motion to dismiss the outrage claim. The Petitioners had attempted to set up the wrongful discharge from employment, the per se slander, and had alleged that these Petitioners had attempted to organize the truckdrivers with a resulting unlawful interference by the employer, all in support of their "outrage claim." In connection herewith, the Petitioners alleged that this wrongful conduct was such as to naturally cause and did cause them and their families to be held up to scorn and ridicule in the community, suffered substantial impairment in their earning capacities and suffered such extreme mental anguish as to cause physical illness.

Florida has recognized the tort of intentional or reckless infliction of extreme mental anguish as evidenced by the following authorities and decisions: 32 Fla. Jur., *Torts,* §15-Interference with Emotional Tranquility, p. 143; *Deland v. Florida Transp. & Leasing Corp.,* 293 So.2d 800, (Fla. App. 1974); *World Ins. Co. v. Wright,* 308 So.2d 612 (Fla. App. 1975); and *Fletcher v. Florida Publishing Co.,* 319 So.2d 100 (1975).

CONCLUSION

It is respectfully suggested that the Petitioners herein have been denied their Fifth and Fourteenth Amendment-Civil Rights as implemented through Title 42, U.S.C. including their procedural and substantive due process rights, for which it is respectfully prayed that this Honorable Court will take jurisdiction of this cause and enter order quashing the decision of the Fifth Circuit Court of Appeals and reinstating this cause for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished by U.S. Mail this ____ day of September, 1980 to Benjamin H. Hill, III, Esquire and Charles P. Schropp, Esquire of Shackleford, Farrior, Stallings & Evans, P.A., P.O. Box 3324, Tampa, Florida, 33601, Attorneys for Respondent.

I further certify that all parties required to be served have been served.

_____

BRITT WHITAKER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3263

JAMES C. BURNS, ET AL.,
Plaintiffs,

versus

GULF OIL CORPORATION,
Defendant.

Appeal from the United States District Court for the Middle District of Florida

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(JUNE 4, 1980)

Before RUBIN and POLITZ, Circuit Judges and POINTER*, District Judge.

PER CURIAM:

Gulf Oil Corporation discharged twelve of its truck drivers who took gasoline for their personal use without paying for it. The plaintiffs argued that Gulf

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* District Judge of the Northern District of Alabama sitting by designation.

breached an employment agreement and also sought recovery of damages for slander and intentional infliction of emotional distress. After much skirmishing and amending of pleadings, the trial judge granted summary judgment for the defendant on all claims.

I

There is no merit to the contract claim. The employment contracts were for an indefinite term and were terminable at will by either party. Thus, under Florida law Gulf had the right to fire the employees for any reason or even for no reason. *See* Harrison v. Jack Eckerd Corporation, 342 F.Supp. 348 (M.D. Fla.), *aff'd*, 468 F.2d 951 (5th Cir. 1972). However, Gulf clearly had good cause — theft of company property, a major offense under the company rules. The plaintiffs' participation in employee benefit plans, such as retirement program and stock option plan, did not change the contract terms or give them a vested property interest in their jobs. *Id.*

The plaintiffs tangentially toss in a suggestion that they were fired to deter union organization. If the plaintiffs had wished to advance a labor-related claim, they should first have filed the claim with the National Labor Relations Board. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, ____ L.Ed.2d ____ (1959).

II

The plaintiffs also alleged slander and intentional infliction of emotional stress by the defendant. On the day of the trial, Gulf filed a motion in limine to confine the introduction of evidence to these allegations. The judge granted the motion. The plaintiffs argue that the motion caught them by surprise. We find it unnecessary to consider the plaintiffs' argument that they were entitled to notice of the motion. See Fed.R.Civ.P. 6(d). Aside from the fact that the plaintiffs did not object to the lack of notice at the time the motion was made, the court had ruled previously that only evidence relevant to the alleged torts would be admitted. Thus the plaintiffs had actual notice and there was no prejudice. *See* Herron v. Herron, 255 F.2d 589, 593 (5th Cir. 1958).

The plaintiffs also claimed, in a motion for rehearing, that the trial judge should have recused himself. The motion did not meet the requirements of 28 U.S.C. §144 in form or substance. Moreover, there is no basis in the record for it save dissatisfaction with the trial judge's rulings. The judge's remarks, even taken out of context, do not exhibit prejudice. Indeed, the trial judge was exceedingly patient in permitting repeated amended complaints and in giving the plaintiffs' counsel an opportunity to attempt to demonstrate a basis for the action.

For these reasons, the judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(July 2, 1980)

Before RUBIN and POLITZ, Circuit Judges and POINTER*, District Judge.

PER CURIAM.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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* District Judge of the Northern District of Alabama sitting by designation.